

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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APR - 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 302)
of the Telecommunications Act of 1996)
)
Open Video Systems)

CS Docket No. 96-46

In the Matter of)
)
Telephone Company-Cable)
Television Cross-Ownership Rules,)
Sections 63.54-63.58)

CC Docket No. 87-266

COMMENTS OF HOME BOX OFFICE

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COMMENTS OF HOME BOX OFFICE

Home Box Office ("HBO"), a division of Time Warner Entertainment Co., L.P., hereby submits its comments on the Notice in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

HBO fully supports the Commission's dual goals in this proceeding to promote competition in the multichannel video programming distribution ("MVPD") marketplace and to ensure that all programmers/packagers are treated in a non-discriminatory

¹ In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, FCC 96-99 (released March 11, 1996) ("Notice").

manner by OVS operators.² HBO focuses in these comments on the non-discrimination issues.

In adopting non-discrimination rules, the Commission's guiding principle should be that OVS operators may not discriminate against any programmer/packager with respect to any aspect of the OVS operation, including channel allocation, information provided to subscribers, pricing for access to OVS capacity, and channel sharing arrangements. HBO believes the specific proposals discussed below will ensure non-discriminatory treatment of programmers, while not overburdening OVS operators with unnecessary regulations. The proposals therefore support both of the goals set out by the Commission in the Notice.

NON-DISCRIMINATION IN PROGRAM CARRIAGE

- The Commission should measure capacity of an OVS system based on the number of channels for the analog portion and on the bandwidth for the digital portion. The 1/3 allocation rule should apply separately to analog and digital capacity.
- If demand exceeds capacity after the initial allocation process closes, OVS operators should not be required to relinquish their allotment of channels. The OVS operator should be required to hold a new enrollment period every five years to allow new programmers to seek access to OVS capacity (if demand exceeds capacity at that time). At that time, OVS capacity could, if necessary, be reallocated.
- The Commission should not set technical standards for OVS, but should prohibit OVS operators from using technical requirements anticompetitively.
- A "must-buy" requirement should not be imposed on subscribers to any MVPD.

² See Notice at ¶ 10.

NON-DISCRIMINATION IN SUBSCRIBER INFORMATION

- All program services, both affiliates and non-affiliates, must appear on the program selection device used by the OVS operator.
- All trademark, logo, and unique branding information transmitted by the programmer must be included by the OVS operator as part of the programmer's retransmitted service and in the OVS menuing system.
- The OVS operator may not discriminate in favor of its programmer affiliate when it provides "material or information" to subscribers.

NON-DISCRIMINATION IN PROGRAMMER RATES

- The rates charged for programmer/packager access to OVS capacity should be based on the following:
 - cost-based pricing;
 - different prices for analog and digital capacity; and
 - required publication of the OVS rate card.
- The rates charged for inclusion in an OVS package should be based on the following:
 - negotiation between the parties, subject only to the program access and program carriage rules;
 - no required publication of programmer-packager contracts; and
 - no regulation of the rates charged by the programmer/packager to subscribers.

NON-DISCRIMINATION IN CHANNEL SHARING ARRANGEMENTS

- Programmers must retain ultimate control over the use of their programming, including the right to negotiate all relevant terms with each packager that seeks authority to distribute a program service on a shared basis;
- No programmer may be required to include its programming in a channel sharing arrangement; and

- Each packager that wishes to include a program service on a shared channel must first obtain permission from the programmer.

Finally, the Commission should adopt all rules regarding OVS operation in this proceeding, rather than pursue an ad hoc approach. Establishing standards in a rulemaking promotes stability for OVS operators, programmers, and consumers. Also, in the absence of such established standards, the Commission will be unable to meaningfully approve or disapprove OVS certification requests within the 10-day statutory timeframe. Similarly, the Commission should promote certainty by resolving in this proceeding the regulatory status of video dialtone systems that had been approved prior to enactment of the 1996 Act. HBO urges the Commission to require such grandfathered VDT systems to be converted to one of the four available regulatory models set out in section 651(a). It makes no sense to continue on an isolated basis a regulatory scheme that has been eliminated.

II. NON-DISCRIMINATION IN CARRIAGE OF VIDEO PROGRAMMERS

A. The Measurement of OVS System Capacity Should Be Based on the Number of Channels for the Analog Portion and on the Bandwidth for the Digital Portion.

The Notice correctly points out that measuring OVS capacity "may not be entirely clear in all cases."³ This will be especially true in OVS systems which contain both analog and digital capacity. The measurement of analog and digital capacity

³ See Notice at ¶ 17.

is different in that only one service at a time can be transmitted over a 6 MHz analog channel regardless of the service's underlying content, whereas the number of simultaneous services that can be transmitted over the same 6 MHz in digital format will vary depending on the type of information delivered and the picture quality the programmer desires.

However, digital capacity and analog capacity are different not only from a measurement perspective but also from the point of view of consumer accessibility and cost. All program services transmitted over digital capacity require a digital box in the home for the subscriber to view the program service. By contrast, when a program service is transmitted over analog capacity, the service is often available to all existing TVs without the need for a set-top box. Moreover, in cases where a set-top box is necessary to receive program services transmitted over analog capacity, the analog box is roughly three times less expensive than a digital box. For these reasons, analog capacity is generally more desirable than digital capacity. This is especially true given the relative scarcity of analog capacity as opposed to digital capacity.

In light of this fundamental difference between analog and digital capacity, the Commission should measure capacity of an OVS system based on the number of channels for the analog portion and on the bandwidth for the system's digital portion. Moreover, section 653(b)(1)(B)'s requirement that an OVS operator may select programming on no more than 1/3 of the OVS capacity when

demand exceeds capacity ("the 1/3 rule") should be applied separately to the analog and digital portions of the OVS system.⁴

Take, for example, a 1 GHz OVS system that is divided into 80 (6 MHz) analog channels and 520 MHz of digital bandwidth. Applying HBO's proposed rule to this system would work as follows: If programmers/packagers sought 81 analog channels, the 1/3 rule would be triggered, since demand for analog capacity exceeds supply. As a result, the OVS operator would be able to select programming on only 1/3 of the 80 analog channels. Similarly, if programmers/packagers sought 530 MHz of digital bandwidth, the OVS operator would be limited to selecting the programming on only 1/3 of the system's digital bandwidth.⁵

This bifurcated approach is more consistent with the technical and economic realities of the analog-digital distinction. It also limits the possibility that the OVS operator will discriminate in favor of its affiliated programmers by allocating the more desirable capacity to itself.⁶

⁴ See also p. 20-21, infra, for a discussion regarding the different prices that should apply for access to analog and digital OVS capacity.

⁵ However, HBO agrees with the Notice's tentative conclusion that although an OVS operator may select programming on no more than 1/3 of the system's capacity in such situations, it should also be permitted to enter into agreements to offer to subscribers the programming services selected for carriage by unaffiliated video programming providers. See Notice at ¶ 27.

⁶ Even if the 1/3 rule is not triggered, the OVS operator should not be permitted to discriminate in favor of its programming affiliates with respect to channel allocations. For example, even if excess capacity is available, an OVS operator should not be permitted to allocate all of the system's analog

(continued ...)

B. An OVS Operator Should Not Have to Relinquish Its Allotment of Selected Programming In Situations Where Demand Arose to Exceed Capacity Only After the Initial Allocation Process Has Closed.

HBO agrees with the Commission that requiring OVS operators to relinquish their allotment of selected programming in situations where demand arose to exceed capacity only after the initial allocation process closes could seriously undermine the viability of OVS. The Commission should adopt rules that establish some level of certainty in this area. Certainty serves OVS operators (and programmers carried in their packages) in that they can make business plans based on their known ability to retain channel capacity once allocated; certainty also serves consumer interests in uninterrupted service.

In order to balance the need for certainty and market stability with the Act's 1/3 rule, HBO recommends that OVS operators be required to hold a new enrollment period every five years.⁷ At that time, capacity on the OVS system could, if necessary, be reallocated. This five-year timeframe will provide OVS operators and programmers/packagegers certainty to establish

(... continued)

channels for its affiliate's use and require all other video programming providers to use digital capacity (even those that requested only analog capacity). See Notice at ¶ 21. Since the non-discrimination carriage requirement of section 653(b)(1)(A) is independent of section 653(b)(1)(B)'s 1/3 rule, the OVS operator should be precluded from discriminating in favor of its affiliates regardless of whether the 1/3 rule has been triggered.

⁷ Of course, if demand does not exceed capacity at the five-year mark, such an enrollment period should not be mandatory.

long-term business objectives, obtain financing, and develop strategies for OVS carriage negotiations.

C. The Commission Should Not Set Technical Standards in an Effort to Promote Access to OVS, But Should Prohibit OVS Operators From Using Technical Requirements Anticompetitively.

HBO urges the Commission to refrain from adopting technical standards in an effort to promote access by programmers to OVS systems. As a general matter, HBO believes that technical standards should be set by the marketplace, not by the Commission or any other governmental entity.

Moreover, there is no reason for the Commission to attempt to establish technical standards in this area since no market failure has occurred. Currently, MVPDs use different technical parameters, programming formats, compression and modulation schemes, etc. Despite these varying parameters, HBO and other programmers package their services in ways that facilitate carriage on each of these distribution systems. Moreover, the marketplace is already driving this process towards a more standardized environment. Various industry standard-setting bodies are establishing standards to facilitate compatibility and access to broadband networks. In short, market forces are working appropriately and should be left undisturbed by government intervention. This approach is consistent with the deregulatory principles of the 1996 Act and with Congress's

specific directives to avoid government standard-setting in dynamic industries:

The conferees intend that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services.⁸

The Committee intends that the Commission should promptly complete its pending rulemaking on cable equipment compatibility, but not at the risk that premature or overbroad government standards may interfere in the market-driven process of standardization in technology-intensive markets.⁹

Allowing the Commission to establish standards for computers, software, and other technologies would have the effect of freezing technology, slowing innovation, and limiting the development of new features and capabilities.¹⁰

Of course, the Commission is correct that OVS operators should be prohibited from using technical requirements in anticompetitive ways to limit or preclude access by programmers.¹¹ Section 653(b)(1)(A)'s non-discrimination prohibition extends to technical requirements as much as it does to rates and other terms of carriage. The Commission should therefore make clear in its rules that OVS operators may not discriminate among programmers or restrict access to any programmer through the imposition of varying technical requirements.

⁸ H.R. No. 458, 104th Cong., 2d Sess. 181 ("Conference Report").

⁹ Id. at 170-171.

¹⁰ H.R. No. 204, 104th Cong., 1st Sess. 83 (1995).

¹¹ See Notice at ¶ 23.

D. A "Must-Buy" Requirement Should Not Be Imposed on Any Consumer.

The Notice asks whether the Commission should require all subscribers to take a package of must-carry and PEG channels as a condition for subscription to other services.¹² HBO strongly opposes a "must-buy" requirement for OVS systems or for any MVPD, including the requirement currently imposed on cable operators.¹³ Any such must-buy requirement is contrary to the 1996 Act, long-standing congressional policy, and the First Amendment.

While the Act confers a special status on broadcasters and PEG channels with respect to their access to the OVS system,¹⁴ it imposes no such special status with respect to a subscriber's purchase options. In fact, the statutory language compels the opposite conclusion. Section 653(b)(1)(E)(iv) prohibits an OVS operator from "omitting television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide, or menu." If Congress had intended that all subscribers take all broadcast and PEG channels on the OVS system, there would have been no need for this provision, since all broadcast stations, by virtue of their must-

¹² See id. at ¶ 59.

¹³ See 47 C.F.R. § 76.920. In this regard, HBO fully supports the petition for reconsideration filed by TCI in MM Docket 92-266 on June 21, 1993 opposing the cable must-buy requirement. The Commission has not yet addressed this reconsideration petition.

¹⁴ See Communications Act, § 653(b)(1)(A).

buy status, would necessarily have been included on any navigational device, guide, or menu. This provision demonstrates that while the OVS operator must offer television broadcast stations and PEG channels to all subscribers, it cannot require subscribers to buy or subscribe to any of these programs.

In addition, a must-buy requirement is squarely at odds with long-standing congressional policy in favor of the unbundling of programming choices for subscribers:

[G]reater unbundling of offerings leads to more subscriber choice. ... Through unbundling, subscribers have greater assurance that they are choosing only those program services that they wish to see and are not paying for those programs they do not desire.¹⁵

Finally, a must-buy requirement poses serious First Amendment concerns for both subscribers and programmers. It impinges on subscribers' rights to determine what messages they will permit to cross the threshold into their homes and which must remain outside. As the Supreme Court held in Rowan v. Post Office Department, the right of people to be let alone in their homes is paramount to any First Amendment right of the sender:

[A] sufficient measure of individual autonomy must survive to permit every household to exercise control over unwanted mail. ... Weighing the highly important right to communicate ... against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate¹⁶ must stop at the mailbox of an unreceptive addressee.

¹⁵ S. Rep. No. 92, 102d Cong. 1st Sess. 77 (1991).

¹⁶ Rowan v. Post Office Department, 397 U.S. 728, 736-37 (1970).

The rights of a subscriber who is "unreceptive" to a certain package of video programming are no less constitutionally compelling than those of the addressee in Rowan.

A must-buy requirement likewise infringes the First Amendment rights of a la carte programmers, such as HBO, by: (1) singling out such programming and burdening it with a governmentally mandated minimum price (i.e., the subscription fee for a "lifeline" tier of programming); and (2) imposing upon such programmers the obligation of delivering the programming of others as a precondition of the government allowing their voices to be heard.

For the foregoing statutory, policy, and constitutional reasons, HBO urges the Commission to refrain from imposing a must-buy requirement in the OVS context. Moreover, HBO requests that the Commission answer TCI's pending reconsideration petition on this issue in MM Docket 92-266 by eliminating the must-buy requirement for cable operators.

However, if the Commission does not remove the must-buy requirement for cable operators, in the interest of establishing fair rules of competition among MVPDs, HBO recommends that OVS operators also be subject to a must-buy requirement.

III. NON-DISCRIMINATION IN INFORMATION PROVIDED TO SUBSCRIBERS

A. Non-Discrimination in the Use of Navigational Devices

While an OVS operator's assignment of analog channels could be a source of discrimination,¹⁷ channel mapping technology can eliminate any potential problems. The much more significant set of issues involves the potential for discrimination within the OVS navigational device, guide, or menu. In a digital world, the subscriber will no longer select a program for viewing by "tuning" to a pre-designated, numerically labeled "channel number." Indeed, subscribers may be unaware of what channel frequency a program is "on." Rather, the subscriber, using an advanced handheld remote control or other pointing device, will interact with an on-screen, icon or menu-based program guide to browse through various options and highlight the desired program. This sophisticated, interactive program guide will also enable the subscriber to perform customized searches for particular types of programs. For example, a subscriber will be able to call up on the screen all the movies that are available for viewing at a particular time, or all the sports, news, etc.

In such a "channel-less" environment, the interface that the user employs to search for and select programming will be a critical element of any video distribution system. The inclusion of a program service in such a user interface and its placement within the menuing structure will determine how accessible the

¹⁷ See Notice at ¶ 22.

program service is to subscribers and to a large degree how successful the program service is.

If the OVS operator is able to discriminate in favor of its programming affiliate through the interface used by the subscriber to select programming, the viability of non-affiliated programmers/packagegers on the OVS system will be significantly threatened. The following two sections suggest ways to limit potential discrimination with respect to navigational devices.

- 1. All Programmers, Both Affiliates and Non-Affiliates, Are Required to Be: 1) Carried on the Navigational Device Used By the OVS Operator; and 2) Presented in a Non-Discriminatory Manner.**

The plain language of section 653(b)(1)(E)(iv) unambiguously prohibits an OVS operator from omitting TV broadcast stations or other unaffiliated programming carried on the system "from any navigational device, guide, or menu."¹⁸ Thus, regardless of whether a subscriber takes a particular program service or package on the OVS system, every program service must continue to appear in the program selection device used by the OVS operator.¹⁹

In other words, the non-discrimination requirement does not lapse after the subscriber makes his/her initial subscription

¹⁸ Communications Act, § 653(b)(1)(E)(iv). HBO believes that the Commission should interpret the terms "navigational device, guide, or menu" to mean any device or mechanism, whether software or hardware-based and whether paper or electronic-based, which an OVS subscriber uses to select programming on the OVS system. See Notice at ¶ 50.

¹⁹ See Notice at ¶ 50.

decision. Rather, this requirement covers both programmers' access to the OVS system and the means by which the programming is offered to subscribers. If this were not the case, the non-discrimination requirement would be a toothless provision. OVS operators that are affiliated with certain program services will have an incentive to favor those services with respect to how they are presented to consumers. For example, if the package containing the OVS operator's affiliated program services were the only programming the subscriber saw when it turned on its navigational device, all non-affiliated programmers would be at a significant disadvantage in terms of their ability to attract new subscribers. This contravenes the plain meaning and the policy objectives behind the Act's non-discrimination provisions.

Finally, it is not enough that each non-affiliated programming service be included somewhere in the menuing system. Depending on how the system is constructed, placement within the menuing system could be just as discriminatory as complete omission. For example, if the OVS operator prominently displayed an affiliated service on the first level of the menu system and simultaneously placed a competing program service several levels deep into the menuing system, the discriminatory impact on the non-affiliated service could be substantial.

To avoid discrimination, it is critical that the Commission require OVS operators to afford each programmer/packager equal access to the navigational device. This equal access requirement can only be satisfied if all consumers are able to select a

particular program service just as easily as they are able to select any other service on the navigational device.

In addition, the Commission should establish a rule requiring mutual agreement between OVS operators and individual programmers with respect to the categorization of program services within the navigational device. For example, the OVS operator should not be permitted to include HBO under any particular program category without HBO's approval. This mutual agreement rule will ensure that program services such as HBO are appropriately classified and readily accessible to OVS subscribers.

These requirements are fully consistent with section 653(b)(1)(E)(i) which prohibits an OVS operator from discriminating in favor of any program service with respect to the "material or information" provided by the OVS operator to subscribers "for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers."²⁰

²⁰ The Notice asks for comment on the relationship between section 653(b)(1)(E)(i) and section 653(b)(1)(E)(iv). See Notice at ¶ 49. HBO believes that the foregoing discussion answers this question, namely section 653(b)(1)(E)(iv) prohibits the actual omission of an unaffiliated program service from an OVS navigational device, guide, or menu, while section 653(b)(1)(E)(i) prohibits the effective omission of programming through such things as menu placement, searchability, etc.

2. The Commission Must Require OVS Operators to Carry the Unique Branding Information of Each Program Service as Part of the Program Display and in the OVS Navigational Device.

Sections 653(b)(1)(E)(ii and iii) further limit an OVS operator's ability to discriminate against programmers by requiring carriage of a programmer's or copyright holder's "identification." These statutory requirements recognize the significant value embedded in a programmer's brand or trademarked name. The HBO mark, for example, is unique, well known and, like any other valuable mark, is essential for the successful marketing of HBO's products. These provisions simply require that if HBO, or any other programmer, transmits such identifying information along with its programming, that the OVS operator or its affiliated packager pass this information through to the subscriber in an unaltered state. Thus, for example, if HBO movies carry an HBO logo in the bottom corner of the picture screen, this identifying mark may not be stripped by the OVS operator or affiliate.

Section 653(b)(1)(E)(ii) also requires the Commission to apply this same principle with respect to the identification information displayed on the OVS system's navigational device. If, for example, HBO wishes to place its logo or name next to its menu selection item on the navigational device, the OVS operator should not be allowed to refuse inclusion of such identifying information. Such a refusal would be squarely at odds with

programmers' statutory right to "suitably and uniquely [] identify their programming services to subscribers."²¹

B. Non-Discrimination in the Use of Other "Material or Information."

The non-discrimination principles discussed above should extend equally to all other "material or information" provided to "consumers" regarding the programming that is available on the OVS system. This rule is required to prevent the OVS operator from using its marketing and advertising efforts to discriminate in favor of its affiliated programmers.²²

For example, if all advertising time available on the OVS navigational device or all promotional materials mailed to consumers are devoted to OVS-affiliated program packages, the OVS operator will have discriminated in favor of its affiliated programming contrary to the clear prohibition in the Act.

HBO agrees with the Commission's belief that Congress did not intend to hinder an OVS operator's ability to advertise for its affiliated video programming services.²³ However, such

²¹ See Communications Act, § 653(b)(1)(E)(ii).

²² Although the Act uses the term "subscribers," HBO believes the Commission should apply this provision with respect to all materials and information on program selection provided by the OVS operator to consumers. If OVS operators are able to discriminate in favor of their affiliated programming services before a consumer actually selects an OVS programming package or service, this non-discrimination requirement will be rendered meaningless since the OVS operator will be able to favor its affiliate pre-subscription and thereby place non-affiliates in the unenviable position of playing catch up after the consumer has already made his/her initial OVS programming selection.

²³ See Notice at ¶ 49.

advertising must be done in the context of the OVS operator's non-discrimination obligations. HBO recommends that the Commission strike a balance between allowing direct OVS advertising and implementing the non-discrimination requirements of section 653(b)(1)(E) by adopting the following specific requirements:

1. An OVS operator must accord equal time, space, and access for advertising and promotional materials by non-affiliates on any navigational device, as well as on OVS cross-channel availabilities and all paper program guides;²⁴ and
2. An OVS operator/affiliate must accept any promotional materials from unaffiliated programmers and include such materials in any "materials and information" regarding program selection provided by the OVS operator to consumers.

IV. NON-DISCRIMINATION IN RATES

Two types of pricing arrangements must be analyzed when considering the issues of non-discriminatory rates in the OVS context: (1) the rates charged by the OVS operator to various programmers/packagegers for access to OVS system capacity; and (2) the rates negotiated between a programmer and a program packager for inclusion in a particular package on the OVS system.

²⁴ As a general matter, HBO believes that the phrase "material or information" should be construed broadly to encompass any materials provided by the OVS operator to the consumer, regardless of the format (e.g., electronic or paper) or the method of solicitation (e.g., direct mail or telemarketing).

Two overarching statutory requirements must govern the Commission's approach to each of these pricing arrangements: (1) the rates must be "just and reasonable;" and (2) the rates must not be "unjustly or unreasonably discriminatory."²⁵ Below, HBO proposes a specific approach to each of these two pricing arrangements to carry out this dual congressional directive.

A. Rates Charged for Access to OVS Capacity.

HBO urges the Commission to adopt rules governing the pricing for access to OVS capacity based on the following:

- **Pricing for OVS Capacity Should Be Cost-Based.** A cost-based approach is consistent with the Act's "just and reasonable" requirement.²⁶ It is also consistent with the non-discrimination requirement in that it will prevent the OVS operator from artificially inflating the access rate charged to an affiliated programmer/packager in order to "justify" a higher rate to a non-affiliate.
- **Different Costs Should Apply for Analog and Digital Capacity.** Digital and analog capacity have different costs. For example, a 6 MHz channel of analog capacity will allow only one program service to be transmitted, while the same 6 MHz can transmit on average up to 6 simultaneous digital program services. This suggests that the cost for digital capacity should be less than the cost for analog capacity.

²⁵ See Communications Act of 1934, as amended, § 653(b)(1)(A).

²⁶ As the Notice correctly points out, the language Congress used -- "just and reasonable" rates -- is similar to the language of Title II. See Notice at ¶ 30. Of course, a reasonable profit should be built in to the pricing process. The OVS operator should be permitted to justify different pricing based on a difference in the cost of providing service to the video programmer. See id. at ¶ 32.

Of course, other costs are incurred to transmit digitally, most notably the digital box that is required in the subscriber's home. However, since all digital capacity on the OVS system will require a digital box, the cost of the box should be allocated among all available digital "channels" on the system. This will avoid a situation in which the first digital programmer on the system is required to pay the entire cost for the digital box, while subsequent programmers receive a free ride in the use of the box.

On the whole, therefore, HBO believes that the OVS operator's rate card should indicate a lower price for the use of digital capacity.²⁷

- **Program Access and Program Carriage Rules Should Apply.** Section 653(c)(1)(A) makes clear that the program access and program carriage provisions of the Communications Act apply to the carriage relationship between the OVS operator and programmers. The Commission should incorporate this requirement into its rules to further limit discrimination (for example, such rules should make it clear that an OVS operator could not require a financial interest in a programmer as a condition for carriage).
- **Publication of OVS Rate Card Should Be Required.** To ensure that OVS rates are just, reasonable, and non-discriminatory, OVS operators should be required to provide a rate card to all programmers/packagegers that seek access to OVS capacity.²⁸

²⁷ In addition, the parameters established for pricing differences between analog and digital pricing would have to be revisited as technology changes, for example as digital compression allows more services to be carried in the same bandwidth and as digital box costs continue to drop.

²⁸ See Notice. at ¶ 34.

B. Rates Charged for Inclusion in an OVS Package.

HBO urges the Commission to adopt rules governing the pricing arrangements between programmers and OVS packagers based on the following:

- **Negotiation Between the Parties Should Govern Pricing.**
The pricing arrangements between programmers and OVS packagers should be left to the negotiations between the parties (subject to the rules discussed below) just as they are with respect to other video distributors.²⁹
- **Program Access and Program Carriage Rules Should Apply.**
Since OVS packagers are "MVPDs," the program access and program carriage rules apply to the carriage relationship between OVS programmers and OVS packagers. Under these rules, while a programmer may refuse to sell its programming to a particular distributor and while a packager may refuse to carry a particular programmer, such decisions must be based on legitimate, non-discriminatory reasons. HBO has and will continue to negotiate with its distributors under these terms, and asks that the Commission make clear in its rules that OVS packagers (as well as the OVS operator) are under a corresponding obligation.
- **No Publication of Programmer-Packager Contracts.**
Neither the OVS programmer affiliate nor unaffiliated programmers/packagers should be required to make negotiated contracts publicly available. This issue should be treated no differently in the context of OVS than it is with respect to other video distributors, such as cable. Specifically, contracts entered into after negotiations between the programmer and the OVS packager contain proprietary information and should remain confidential.³⁰

²⁹ Of course, if a programmer does not wish to be offered in an OVS package, it should still be accorded non-discriminatory access to the OVS system. The rate for such access should be governed by the principles discussed in the previous section.

³⁰ Of course, to the extent a competing MVPD wishes to challenge the rate or terms negotiated between a programmer and a packager, it may file a program access complaint with the Commission and seek access to the contractual terms. See, e.g.,
(continued ...)

- **No Regulation of OVS Packager/Programmer Subscriber Rates.** The rates charged by OVS programmers/packagers to subscribers should be governed by market forces. Such pricing flexibility is justified given the increasingly competitive nature of the MVPD marketplace.

V. NON-DISCRIMINATION IN CHANNEL SHARING ARRANGEMENTS

While HBO agrees with the Act and the Notice's endorsement of channel sharing as a mechanism for increasing the efficient use of OVS capacity, channel sharing also poses potentially significant problems for programmers. For example, channel sharing may have implications for program security, disconnection of non-paying subscribers, marketing, billing and collection, and disaffiliation with non-paying packagers.

It is difficult at this time for HBO or the Commission to accurately assess the nature and extent of these problems because channel sharing arrangements have not previously been utilized to distribute video programming. Consequently, HBO strongly supports the Notice's tentative conclusion that programmers retain ultimate control over the use of their programming.³¹ It is essential, given the potential risks and problems implicated by channel sharing, that programmers are able to negotiate all relevant conditions with each packager that seeks authority to

(... continued)

47 C.F.R. § 76.1003(h) (describing treatment of proprietary information in the context of a program access complaint).

³¹ See Notice at ¶ 41.